IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-73

JOHN WRIGHT, d/b/a TOUCH OF CLASS MASSAGE PARLOR; MARY KAY GILBERT; MARY JO KOCHER; KARON GRIFFIN, et al.,

Appellants

-vs-

CITY OF INDIANAPOLIS; WILLIAM HUDNUT, as Mayor of the City of Indianapolis; FRED ARMSTRONG, as City Controller of the City of Indianapolis; CONSOLIDATED CITY OF INDIANAPOLIS,

Appellees

RESPONSE TO MOTION TO DISMISS OR AFFIRM

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INDEX

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APPELLANTS' RESPONSE TO APPELLEES' MOTION TO DISMISS OR AFFIRM

I.
STATEMENT OF THE CASE

Your appellants rely upon their statement of the case as set forth in the jurisdictional statement filed with this Court.

The appellants, in this statement of the case, would also like to take issue with certain portions of the statement of the case set forth by the appellees in their motion to dismiss or affirm.

In paragraph 2, of the appellees' statement of the case, the appellees stated:

> "During the first nine months of 1976, 51 arrests and summonses were effected as a result of illegal activities taking place at the 13 massage parlors located within the Indianapolis Police Service District."

This statement is merely a conclusion set forth by the City of Indianapolis, which was not allowed into evidence, or made a part of their record at the trial Court proceedings. At the trial Court proceedings, the City attempted to introduce evidence of 51 arrests and summonses taking place at the 13 massage parlors, but this was not allowed into evidence in that there were no convictions alleged or shown resulting from these arrests, and also it was not shown by the City that any of these arrests took place at any of the appellants' places of business, nor were any of the

appellants or individuals of this lawsuit involved in any of the 51 arrests and summonses alleged by the City. As these facts are not in evidence, nor a part of the record herein, it is the appellants' contention that they are not relevant nor should they be made a part of the statement of the case presented to the United States Supreme Court for its jurisdictional determination.

II.
ARGUMENT

A. THE APPEAL TO THIS COURT WAS TIMELY

The appellees state in their motion to dismiss or affirm filed with this Court, that the final judgment in the case at barr was not rendered until March 6, 1978. The appellees also state that no notice of appeal was filed within 90 days of the judgment, and that accordingly, this Court has no jurisdiction to hear the appeal.[1]

1. Appellees' motion to dismiss or affirm, page 4.

The appellants would point out that the Court's denial of their petition for rehearing and remand was on the 6th day of March, 1978, but that the opinion and rulings of the Indiana Supreme Court were not certified by the Clerk of said Court until the 10th day of March, 1978, as indicated in the appellants' jurisdictional statement.[2]

The docketing of this cause on the 7th day of June, 1978, is within the 90 day time limitation and therefore renders this appeal to the Supreme Court timely. Notice of appeal had been filed prior thereto by the appellants as admitted in the appellees' motion to dismiss or affirm on page 3.

It is the appellants' contention that under Indiana law the final action of the Indiana Supreme Court, and the entry of the judgment therein and its validation is done when the Clerk of said Court certifies the same. This was not done until the 10th day of March, 1978, as indicated by Appendix J to appellants' jurisdictional statement.

2. Jurisdictional statement, page 3.

United States Supreme Court Rule 13, setting forth the procedure and time limitations for docketing cases, states:

> "1. Not more than 90 days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, . . ."

It is the appellants' contention that this same was complied with by the appellants when they filed their jurisdictional statement within 90 days of the certification of the judgment and opinion of the Indiana Supreme Court by the Clerk of the same.

Appellate Rule 15, of the Indiana Rules of Appellate Procedure, sets forth rules on opinions, powers, and conduct of the Court on appeal; and miscellaneous provisions, states:

> "(B). CERTIFICATION OF OPINIONS AND MEMORANDUM DECISIONS. The Clerk shall send an uncertified copy of the opinion, opinions or memorandum decision of the Court of Appeals or the opinion or opinions of the Supreme Court to the attorneys of record at the time the opinion, opinions, or memorandum decision on appeal is handed down.

> Opinions and memorandum decisions shall not be certified to the Court below by the Clerk of this Court until the expiration of the time within which a petition for a rehearing may be filed and a petition for transfer may be filed, except upon a filing of a waiver in such a case. Upon the denial of a petition for a rehearing, in event no petition to transfer is filed within the time allowed, the Clerk of this Court shall thereupon certify the opinion or memorandum decision to the Court below, at the expiration of such time. In event a petition to transfer is filed the opinion or memorandum decision shall be certified upon the denial of such petition to transfer; if the petition to transfer is granted no memorandum decision or opinion shall be certified until the final disposition of the case in the Supreme Court.
>
> (C) DELIVERY OF OPINIONS TO REPORTER. The opinions of the Court of appeal shall not be delivered to the Reporter until the opinion has been certified to the trial Court."
>
> (Our emphasis)

It is the appellants' contention that based upon a reading of Appellate Rule 15 of the Indiana Rules of Appellate Procedure, that the date of certification by the Clerk of the Supreme Court is the date of the final entry by the Supreme Court of Indiana. The Rule itself states that the

Clerk shall send an uncertified copy of the opinion to the attorneys of record at the time the opinion is handed down, and also states that opinion and memorandum decisions shall not be certified to the Court below until the expiration of time for the petition for rehearing and all other matters has passed. The decision can not be certified until the final disposition of the case in the Supreme Court. Based upon the reasonable interpretation of this Rule, it is the appellants' contention that the certification of the opinion and decision of the Supreme Court by the Clerk of that Court is the final entry in the matter, and the 90 day appeal time begins to run at such date. In this case, the certification of the Supreme Court opinion and memorandum was made on the 10th day of March, 1978, by the Clerk of the Supreme Court. The 90 day period therefore had not run by the 7th day of June, 1978, and the filing and docketing of this appeal was timely. It is also the appellants' contention, that based upon the wording of Section

(B) of Appellate Rule 15, of the Indiana Rules of Appellate Procedure, wherein it is stated that the opinion of the Court shall not be certified to the Reporter until the opinion has been certified to the trial Court, lends further credence to the fact that such certification is the final entry by the Court, and the date upon which the appeal time must be calculated.

The appellants also refer the Court to Indiana Code 33-15-1-5 (Burns 49-2105), wherein it is stated:

> "CERTIFICATION OF OPINION. Such Clerk shall certify any opinion decision and judgment of the Supreme Court of the State of Indiana. . . to the lower Court from which the cause was appealed, . . . the Clerk of the Court from which the cause was appealed, upon receipt of such certification, shall file the same with the papers in the cause, and the Judge of such Court shall order such opinion, decision and judgment, including the certification thereof, spread of record in the order book of the Court forthwith."

Appellants again cite this provision of the Indiana Code to the Court of Appeals as lending further weight to the contention that the certification of the opinion by the Clerk of the Supreme Court is the last entry thereof,

and the entry which makes said order, opinion or memorandum valid and binding as law in the State.

Appellants also refer the Court to the provisions of Indiana Code 34-3-13-1 (Burns 2-1610), a provision of the Indiana Rules of Civil Procedure setting forth that provisions wherein provisions of the Supreme Court be used as evidence in a cause, wherein it is stated:

> "DECISIONS OF SUPREME COURT. In all cases where a certified copy of the decisions of the Supreme Court of the State of Indiana would be competent evidence in any of the Courts of the State, . . . shall be competent evidence in such Courts, the same is a certified copy of the decisions from the Clerk's office of the Court under seal thereof."

Based upon the above cited provisions of the Indiana Code, and the Indiana Rules of Appellate Procedure, appellants contend that it is clear from the reading of such that the last official act of the Supreme Court, and the last entry thereon from which the 90 day appeal time period must be calculated is the

certification by the Clerk of the Supreme Court of the opinion. As indicated by Appendix J to the appellants' jurisdictional statements, this certification was given by the Clerk of the Supreme Court of Indiana on the 10th day of March, 1978. As such, appeal of this matter, and docketing of the same with the Supreme Court of the United States was timely. Entry of the final act of the Supreme Court of Indiana, and entry of the final judgment is done upon certification of the same by said Clerk.

Appellees are wrong in their assumption on page 5, of the appellees' motion to dismiss or affirm wherein they state in footnote 1 "appellants apparently agree with this analysis of finality." Appellants in their jurisdictional statement set out that the final entry of the Supreme Court, and the date of the final judgment entry upon which the appeal time was calculated was the 10th day of March, 1978, and not the 6th day of March, 1978. A reading of the appellants' jurisdictional statement will bring this issue to light.

The notice of appeal which was filed with the

Indiana Supreme Court prior to the petition for rehearing is sufficient to meet the qualifications and procedures set forth in the Indiana Rules of Appellate Procedure, and also the procedures and actions mandated prior to appeal by the rules of the United States Supreme Court. As such, all necessary qualifications and requirements and procedures for perfecting appeal to this Court were done by appellants, and the same was timely.

B. THE DECISION OF THE INDIANA SUPREME COURT, AND THE ERRORS SET OUT AND ALLEGED AND BROUGHT BEFORE THIS COURT, DO PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

In support of its allegation that this appeal contains important and substantial federal questions, the appellants rely upon the jurisdictional statement previously filed with the Court. The City of Indianapolis Massage Parlor Ordinance, as set out in full in Appendix A, of the appellants' jurisdictional statement, violates the equal protection and due process provisions of the United States and Indiana Constitutions, and certain sections of said ordinance also violates provisions

against unreasonable searches and seizures as set forth in the 4th Amendment of the United States Constitution.

As stated in the appellants' jurisdictional statement, the cases similar to this one have been the subject to extensive litigation in various jurisdictions, and the results and conclusions of the various jurisdictions in Courts in interpreting these provisions of "massage parlor ordinances" has left the law, and the constitutional rights of individuals and businesses in confusion and limbo, and these constitutional rights and privileges need to be determined by the Supreme Court in order that the individuals and businesses involved may be informed and apprised of their constitutional rights and priviliges in operating these businesses and conducting and pursuing the livelihood and profession which they have chosen. The results of the various decisions in the jurisdictions as quoted in the appellants' jurisdictional statement has thrown into total confusion the 14th Amendment rights concerning due process and equal protection, and the 1st and 4th Amendment rights con-

cerning the right of privacy and the right to be free from unreasonable searches and seizures throughout the different states and jurisdictions in this land. The United States Constitution, as the supreme document governing and guaranteeing rights to each and every individual and business in the United States, is the supreme interpretation of these rights and the final resting place for these rights, liberties and privileges to be determined. If the rights guaranteed under the United States Constitution are to be common and extended to all citizens and businesses, the interpretation of the same on a national level by the Supreme Court is needed to insure these guaranteed rights and privileges, and vest the same to each and every individual. Massage parlor ordinances such as the one in contention herein, containing the "prohibition of bi-sexual massage provisions", deny basic fundamental rights guaranteed to individuals and businesses by the United States Constitution, and the only authority to settle in finality the issues contended herein is

the Supreme Court of the United States.

The fact that cities and municipalities engage in unreasonable presumptions in enacting these ordinances, based upon alleged illicit sexual activity which cannot be proved at trial in itself denies basic constitutional rights. The additional fact that cities in these instances have reasonable alternative methods of enforcing the criminal laws of the State, which are in existence and have been held valid is further reason for the Supreme Court to review the allegations contained in the jurisdictional statement and make a ruling thereon concerning fundamental rights guaranteed to appellants.

The contentions by the appellants that inspection provisions of the ordinance are violative of the 4th Amendment guarantees of the United States Constitution are valid. In the case of Barlow's, Inc. v. Usury, (D.C. Idaho, 1976) 424 F. Supp. 437, the United States District Court declared that O.S.H.A. inspection provisions which attempted to authorize warrantless inspections of businesses were violative of the 4th Amendment and therefore unconstitutional and invalid as invasions of privacy in authorizing illegal and

unreasonable searches and seizures. The provisions of the O.S.H.A. inspection provisions are very similar in make up, design, and enforcement to those provisions found in municipal ordinance herein. As such, again, to determine constitutional rights, and to effectively express said rights to that appellants and individuals may know their rights and privileges under the United States Constitution, the United States Supreme Court should determine in finality whether provisions of this sort operate to deny basic constitutional rights. The decision by the Indiana Supreme Court in direct contradiction to decisions of other Courts concerning interpretation of the 4th Amendment, again leaves the state of this constitutional provision in confusion and imbalanced throughout the several states.

As such, substantial federal questions are presented for the Court to determine, and

jurisdiction of the same should be noted by the Supreme Court, and their opinion and ruling thereon in determining the constitutional rights of individuals and businesses and appellants herein is in order.

III.
CONCLUSION

For the foregoing reasons, appellants respectfully move this Court to assume jurisdiction in this matter, resolve the same by judgment, opinion or order, and define the rights of the appellants herein.

Respectfully submitted,

JOHN R. CROMER, Attorney for Appellants